Supreme Court, U.S.
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No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

vs.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the United States Constitution permits *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) to bar the relitigation of taxpayers' constitutional claims that were, or could have been, raised in prior litigation when the same claims are raised in subsequent litigation by taxpayers who, although not parties to the prior litigation, share an identity of interest with the taxpayers in the prior litigation, attempt to prosecute the same cause of action, and have no discernible private right involved in that cause of action.

2. Whether the Equal Protection Clause of the United States Constitution permits the Alabama Legislature to authorize Jefferson County to impose an occupational or license tax on those businesses, professions and occupations, and only those businesses, professions and occupations, not already required to pay such a tax under state law.

STATEMENT REGARDING PARTIES

The Certificate of Interested Persons in the Petitioners' Brief on the Merits omits Randy Godeke, the Director of Revenue of Jefferson County, who was a defendant in the proceedings below and continues as a nominal respondent in this case.

There are no parent or subsidiary companies of any corporation required to be identified pursuant to Rule 29.1 of the Rules of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT REGARDING PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Nature of the Challenged Exemptions. 2

B. State Policies Reflected in the Tunstall Act and Successor License Acts. 3

C. Relationship of State and County Taxation in Alabama. 11

D. Original Purpose of Act No. 406. 14

E. Interpretation of Ordinance No. 1120 and Application of the Occupational Tax. 15

F. Incorrect Statements of the Petitioners Regarding Taxpayers Subject to the Occupational Tax. 16

G. Additional License Taxes and Fees Imposed by State on Regulated Professions. 20

H. The Case of *Bedingfield v. Jefferson County*. 21

I. The Proceedings Below. 23

SUMMARY OF ARGUMENT 25

TABLE OF CONTENTS (Continued)

ARGUMENT 26

I. *Bedingfield v. Jefferson County* should bar the Petitioners from further litigating whether the exemptions from the Occupational Tax violate the equal protection clause of the United States Constitution. 26

A. Due process would be better served by using issue preclusion rather than res judicata to bar further litigation of the Petitioners' equal protection claims. 32

B. For purposes of precluding further litigation of the federal equal protection claims, the Petitioners are in privity with the Bedingfield plaintiffs. 33

II. The classifications made by the State of Alabama and by Jefferson County are well within the latitude enjoyed by state and local governments in matters involving taxation. 36

A. Legislative bodies enjoy wide latitude in making classifications for purposes of taxation, and the courts must accord extraordinary deference to such legislative classifications. 36

B. The decisions upon which the Petitioners rely turn on factors not present in this case. 40

C. The classification determining the natural persons who would be subject to the Occupational Tax does not violate equal protection. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases: *Page*

Ahlquist v. Commonwealth Electric Co., 261 N.W. 452 (Minn. 1935) 30

Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) 45

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 37, 41

Anderson v. Jeannotte, 96 N.W.2d 591 (N.D. 1959) 30

Armour Packing Co. v. Lacy, 200 U.S. 226 (1906) 37

Baldwin County v. Jenkins, 494 So. 2d 584 (Ala. 1986) 12

Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927) 31

Bedingfield v. Jefferson County, 527 So. 2d 1270 (Ala. 1988) ..... *passim*

Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232 (1890) 36-37, 39, 46

Bradley v. City of Richmond, 227 U.S. 477 (1913) 38

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 39, 49

Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941) 47

Childree v. Hubbert, 524 So. 2d 336 (Ala. 1988) 4

City Council of Montgomery v. Walker, 154 Ala. 242, 45 So. 586 (1908) 29

City of Cincinnati ex rel. Crotty v. City of Cincinnati, 361 N.E.2d 1340 (Ohio 1977) 30

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

City of El Reno v. Cleveland-Trinidad Paving Co., 107 Pac. 163 (Okla. 1910) 30

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1983) 44-45

Dandridge v. Williams, 397 U.S. 471 (1970) 36

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 27

Drainage Dist. No. 1 Reformed v. Matthews, 234 S.W.2d 567 (Mo. 1950) 30

Eagerton v. Williams, 433 So.2d 436 (Ala. 1983) 35

El Paso Natural Gas Co. v. State, 599 P.2d 175 (Ariz. 1979) 29, 31

Estes v. City of Gadsden, 266 Ala. 166, 94 So. 2d 744 (1957) 13, 15

Farncomb v. City and County of Denver, 171 Pac. 66 (Colo. 1918) 29

FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993) 36, 39, 47

Gardiner v. City of Jersey City, 170 A.2d 820 (N.J. Super 1961) 30

Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930) 32

Harmon v. Auditor of Public Accounts, 13 N.E. 161 (Ill. 1887) 30

Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510 (1993) 27

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922) 39, 46

Heller v. Doe by Doe, 113 S.Ct. 2637 (1993) 40

Holman v. Bridges, 140 S.E. 886 (Ga. 1927) 29

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 42-44

Howard-Sevier Road Imp. Dist. No. 1 v. Hunt, 265 S.W. 517 (Ark. 1924) 29

Hunt v. Chemical Waste Management, 584 So.2d 1367 (Ala. 1991) 36

Johnson v. City of Alma, 149 S.E.2d 661 (Ga. 1966) 29, 30

Jolly v. City of Birmingham, 55 Ala. App. 603, 318 So. 2d 300 (Ala. Civ. App. 1975) 13

Kaufer v. Ford, 110 N.W. 364 (Minn. 1907) 30

Kehrer v. Stewart, 197 U.S. 60 (1905) 37

Kentucky R. Tax Cases, 115 U.S. 321 (1885) 38

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 46

Madden v. Kentucky, 309 U.S. 83 (1940) 38, 46

Martin v. Wilks, 490 U.S. 755 (1989) 33

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 41, 42

N.A.A.C.P. v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 35

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Nachman v. State Tax Commission,
233 Ala. 628, 173 So. 25 (1937) 10

Nevada v. United States, 463 U.S. 110 (1983) 31

New York Rapid Transit Corp. v. City of New York,
303 U.S. 573 (1938) 38, 47

Nordlinger v. Hahn,
112 S.Ct. 2326 (1992) 39, 46

Northern Securities Co. v. United States,
193 U.S. 197 (1904) 26

Peddycoart v. City of Birmingham,
354 S.2d 808 (Ala. 1978) 22

People ex rel. Castle v. Wright,
134 N.E.2d 269 (Ill. 1956) 30

Powell v. City of Joplin, 73 S.W.2d 408 (Mo. 1934) 30

Quong Wing v. Kirkendall, 223 U.S. 59 (1912) 39

Rast v. Van Deman & Lewis Co.,
240 U.S. 342 (1916) 38, 39

Richards v. Jefferson County,
789 F. Supp. 369 (N.D. Ala. 1992),
aff'd without opinion, 983 F.2d 237
(11th Cir. 1992) 23

Riley v. Maloney, 499 N.W. 2d 18 (Iowa 1993) 29

Roberts v. Goldner, 397 A.2d 1090 (N.J. 1979) 30

Rosewell v. La Salle Nat'l Bank,
450 U.S. 503 (1981) 28

Seibert v. City of Columbia,
461 S.W.2d 808 (Mo. 1970) 30

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Sica v. City of Philadelphia,
465 A.2d 91 (Pa.Cmwlth. 1983) 30, 35

Southwest Airlines Co. v. Texas Int'l Airlines,
546 F.2d 84 (5th Cir.),
cert. denied, 434 U.S. 832 (1977) 35

Southwestern Oil Co. v. State of Texas,
217 U.S. 114 (1910) 37

Stallcup v. City of Tacoma, 42 Pac. 541 (Wash. 1895) .. 30

State Board of Tax Commissioners v. Jackson,
283 U.S. 527 (1931) 37, 38

State ex rel. Sullivan v. School Dist. No. 1,
50 P.2d 252 (Mont. 1935) 30

State ex rel. Davis v. Willis,
124 N.W. 706 (N.D. 1910) 30

State ex rel. Brophy v. City of Lakewood,
41 N.E.2d 856 (Ohio 1942) 30

State v. Weil, 232 Ala. 578, 168 So. 679 (1936) 9

Stromberg v. Bd. of Ed. of Bratenahl,
413 N.E.2d 1184 (Ohio 1980) 30, 31

Town of Tallassee v. State ex rel. Brunson,
206 Ala. 169, 89 So. 514 (1921) 29

United States v. Silliman,
167 F.2d 607 (3rd Cir. 1948) 33

W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901) ... 38

Wells v. Heath, 602 S.W.2d 665 (Ark. 1980) 29

WHYY, Inc. v. Borough of Glassboro,
393 U.S. 117 (1968) 42

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Williams v. Fears, 179 U.S. 270 (1900) 39

Zobel v. Williams, 457 U.S. 55 (1982) 41-44

United States Statutes:

4 U.S.C. §111 24

28 U.S.C. §1341 ..... 23, 28

42 U.S.C. §1983 23

Alabama Constitution:

Section 104 12

Section 105 12

Amendment No. 25 ..... 6, 9

Amendment No. 61 9

Alabama Code Provisions:

Ala. Code 1940, Tit. 51, Chap. 20, Art. 1, now codified as Ala. Code 1975, Tit. 40, Chap. 12, Art. 2 6

Ala. Code 1940, §51-176, now Ala. Code 1975, §40-21-52 ..... 6, 7

Ala. Code 1940, §51-177, now Ala. Code 1975, §40-21-50 ..... 6, 7

Ala. Code 1940, §51-178, now Ala. Code 1975, §40-21-53 ..... 6, 7

TABLE OF AUTHORITIES (Continued)

Alabama Code Provisions: *Page*

Ala. Code 1940, §51-180, recodified as Ala. Code 1975, §40-21-57, but repealed in 1994 ..... 6, 7

Ala. Code 1940, §51-182, recodified as Ala. Code 1975, §40-21-58, but repealed in 1992 ..... 6, 7

Ala. Code 1940, §51-183, recodified as Ala. Code 1975, §40-21-59, but repealed in 1992 ..... 6, 7

Ala. Code 1940, §51-184, now Ala. Code 1975, §40-21-60 ..... 6, 7

Ala. Code 1940, §51-429 ..... 6, 8

Ala. Code 1940, §51-826 ..... 6, 8

Ala. Code 1975, §11-51-90 ..... 13, 15

Ala. Code 1975, §11-51-200 *et seq* 12

Ala. Code 1975, §27-4-9 8

Ala. Code 1975, Tit. 34 20

Ala. Code 1975, §40-1-31 5

Ala. Code 1975, Tit. 40, Chap. 12, Art. 1 7

Ala. Code 1975, Tit. 40, Chap. 12, Art. 2 ..... 6, 7

Ala. Code 1975, §40-12-2 14

Ala. Code 1975, §40-12-3 14

Ala. Code 1975, Tit. 40, Chap. 16 8

Ala. Code 1975, §40-16-6 8

Ala. Code 1975, Tit. 40, Chap. 21, Art. 2 7

Ala. Code 1975, §40-21-64 8

Ala. Rules of Appellate Procedure, Rule 5 24

TABLE OF AUTHORITIES (Continued)

Alabama Acts: *Page*

Ala. Acts, 1927, Act No. 163 ..... 3, 5, 8, 9

Ala. Acts, 1935, No. 194 6

Ala. Acts, 1967, Act No. 405 13

Ala. Acts, 1967, Act No. 406 ..... *passim*

Ala. Acts, 1973, Act No. 659 13

Ala. Acts, 1995, Act No. 95-740 4

Ala. Acts, 1995, Act No. 95-748 4

Ordinances:

City of Birmingham, Ordinance No. 70-75 14

Jefferson County, Ordinance No. 1120 ..... *passim*

Jefferson County, Ordinance No. 1172 15

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama (J.A. 110) has not yet been reported in the Southern Reporter, 2d Series, which is the official reporter of Alabama appellate opinions. The order of the Circuit Court of Jefferson County (J.A. 105) is unreported.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257, instead of 28 U.S.C. § 1254 as erroneously stated in both the Petition for Writ of Certiorari and the Petitioners' Brief on the Merits.

STATUTORY PROVISIONS INVOLVED

Alabama Act No. 406, Ala. Acts 1967, and Jefferson County Ordinance No. 1120 are reported in their entirety at J.A. 33 and J.A. 34, respectively. The relevant provisions of the Alabama business license code are reproduced in the Appendix to the Brief of Respondents.

STATEMENT

In 1988 the County Commission (the "County Commission") of Jefferson County (the "County") imposed a general license tax (the "Occupational Tax") on natural persons pursuing any occupation within the County (subject to certain exemptions at issue in this case) in an amount equal to ½% of each taxpayer's employment compensation. The Occupational Tax was levied by Ordinance No. 1120 ("Ordinance No. 1120") (J.A. 34) adopted by the County Commission on September 29, 1987, and was to take effect on January 1, 1988. In imposing the Occupational Tax, the County Commission relied on the authority of Act No. 406 ("Act No. 406") (J.A. 33), enacted by the Legislature in 1967, and limited the tax in

accordance with the exemptions mandated by the act. This case arises from an action commenced by Petitioners Jason Richards ("Richards") and Fannie Hill ("Hill"), on behalf of themselves and other taxpayers similarly situated, contending that the exemptions from the Occupational Tax violated the equal protection clause of the United States Constitution. At the root of their claims are erroneous contentions (i) that there is no rational basis for the exemption of state-regulated professionals from the Occupational Tax and (ii) that a vast number of other people are exempt from the tax when, in fact, they are legally subject to the tax and have been paying it since its inception.

A. The Nature of the Challenged Exemptions. It is regrettable that both the Petition for Writ of Certiorari and the Brief on the Merits submitted by the Petitioners portray the exemptions mandated by Act No. 406 and implemented by Ordinance No. 1120 as a "cockamamie" and "bizarre" (Pet. for Cert. 7) "crazy salad exemption scheme" (Pet. Merits Brief, Quest. I, p.i) that is designedly devoid of all rationality. There are sound reasons, deeply embedded in both the historical and constitutional fabric of Alabama lawmaking, which explain and justify the exemptions challenged in this case. Unfortunately, these reasons were not adequately developed in the proceedings below because of the County's reliance on the preclusive effect of a prior judgment of the Alabama Supreme Court upholding the Occupational Tax, *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988); nor, perhaps, were they sufficiently brought to the attention of this Court prior to its grant of the Petition for a Writ of Certiorari. Nevertheless, this Court has taken jurisdiction of the Petitioners' equal protection claims, and the record of the case, together with the applicable laws, ordinances and public records of Alabama and the County, provide a sufficient basis for the Court's disposition of those claims. In considering the claims, however, it is desirable for this Court to understand the relevant legislative background of Alabama's business license taxes and Act No. 406.

The class of taxpayers exempted by Act No. 406 from any county tax authorized by the act was precisely the class of taxpayers upon which the state had imposed license taxes since 1927. Any taxpayer at any time subjected to a county tax pursuant to Act No. 406 was a taxpayer who had theretofore been fortunate enough to be exempt from any state or county business or occupational license taxes in Alabama. The "exemption scheme" attacked by the Petitioners represents in large measure the categories of businesses and professions selected for taxation by the Legislature of Alabama when, in 1927, it enacted Act No. 163 (named after its sponsor, the "Tunstall Act"; Ala. Acts, 1927, p.139), which was the precursor of Alabama's present business and professional license code.

B. State Policies Reflected in the Tunstall Act and Successor License Acts. Included in the Appendix filed with this Brief is an excerpt from *A History of Educational Finance in Alabama, 1819-1986*, by Dr. Ira W. Harvey, Professor of Education at the University of Alabama in Birmingham (Auburn University, 1989). Resp. Appndx. A-194. As a distinguished academic and former Assistant Director of Finance and Administration for the Alabama Department of Education, Dr. Harvey is a recognized expert on educational finance in Alabama and the related tax laws. Since the Journals of the Alabama Legislature record only actions taken without debate, and since there are no other official sources of legislative history, Dr. Harvey's research provides the only comprehensive record now available of how and why the Tunstall Act and the successor state license code—which constitute the legislative platform of Act No. 406—were enacted.

Alabama's financing of public education, compared with its sister states, is characterized by two anomalies: first, because of very low local property taxes, it finances its public schools with a relatively high percentage of state generated funds and, second, it safeguards those state funds for education by an elaborate system of constitutional and statutory earmarking that prevents their diversion for other governmental purposes. See *Childree v. Hubbert*, 524 So. 2d 336 (Ala. 1988). The main engine for the legal sequestration of educational taxes is the Alabama Special Educational Trust Fund ("ASETF"), to which all state taxes earmarked for public education are committed and from which all annual educational appropriations are made. The largest use by far of state tax revenues in Alabama is for public education, with the appropriations from the ASETF in the current fiscal year amounting to $3,331,000,000 (Ala. Acts, 1995, Act No. 95-748, p.1700), as compared with $862,000,000 from the general fund for the other obligations of state government, including Medicaid, social welfare, prisons and law enforcement (Ala. Acts, 1995, Act No. 95-740, p.1588).

In addition to providing the precursor of the state's business and professional license code, the Tunstall Act in 1927 created the ASETF and the earmarking of educational taxes therefor. The creation of the ASETF as an attempted solution to the then chronic underfunding of public education in Alabama is chronicled by Dr. Harvey. Resp. Appndx. A-194-202. As the result of public pressure and Governor Bibb Grave's adroit legislative strategy, the Tunstall Act was passed as a combination of (i) major business license taxes committed to the ASETF for public education and (ii) various minor business and professional license taxes for the support of general government. *Id.* A-200. The major business license taxes levied and earmarked for education included: taxes of 2.5% on

the gross receipts of intrastate business of railroads and the gross receipts of telegraph companies, telephone companies and express companies; taxes on the generation of hydroelectric power; production taxes on coal mining, iron ore mining and other mineral extraction; and a 15% tax on the wholesale price of tobacco products, Ala. Acts, 1927, pp. 139-148. The ASETF earmarking of such of these educational license taxes as remain in effect has been carried forward into present law. Ala. Code 1975, § 40-1-31. Dr. Harvey explains the combined purpose of the Tunstall Act as follows:

> In addition, this Act placed privilege and license taxes upon insurance companies, accountants, insurance adjusters, architects, attorneys, retail sales from railway cars, dentists, doctors, engineers, motor trucks, auto dealers and assorted other professional and business pursuits, including a tax of two cents per gallon on lubricating oil. The total revenue from this bill was estimated to yield about $4 million in its first year. Practically all of this revenue would be generated from those taxes earmarked to the Alabama Special Educational Trust Fund.

Id. A-202. With hyperbole that can be understood only in light of Alabama's historically sullen resistance to taxation, Dr. Harvey reports *(ibid.)* that Governor Graves celebrated the passage of what, in retrospect, was an extremely modest first step by proclaiming:

> This is Alabama's great day, her independence day. Today she is free and I thank God for this legislature that has done more for the rehabilitation of the state than any other in her history. (Montgomery Advertiser, July 15, 1927.)

As detailed in Dr. Harvey's account of interrelated tax and educational legislation for the legislative quadrennium beginning in 1935 (Resp. Appndx. A-245-260),

the ASETF and the license taxes levied by the Tunstall Act were modified and continued as part of a number of significant developments. A comprehensive revenue act was passed by the Legislature in 1935 (the "1935 Revenue Act"), which among other things (i) expanded the general revenue potential of the Tunstall Act by imposing state license taxes on a number of additional business and professional activities, (ii) levied personal and corporate income taxes pursuant to Amendment No. 25, which had been ratified as part of the Alabama Constitution in 1933, and (iii) adopted state taxation measures for banks and insurance companies that preempted their further taxation by counties and municipalities. Ala. Acts, 1935, No. 194, pp. 256-574. Driving the need for new revenues was the adoption in 1935 of long-needed laws for the improvement of public education, including a school minimum program, state provided textbooks, and supplemental appropriations for unpaid teachers' salaries. Resp. Appndx. A-253-260. With relatively minor revisions since 1935, the business and professional license provisions of the 1935 Revenue Act have been continued in effect and constitute the present state license provisions that, as mandated exemptions from taxes levied pursuant to Act No. 406, give rise to the present case.

Act No. 406, which was enacted when Alabama's Code of 1940 was in effect, authorizes the County "to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940 as amended". J.A. 33. Article 1, Chapter 20, Title 51 of the 1940 Code is now codified as Article 2 of Ala. Code 1975, Tit. 40, Chap. 12, and for convenience has been reproduced in the Appendix to this Brief. Resp. Appndx.

A-17. The general provisions of the state license code relating to the levy and collection of the license taxes imposed by said Article 2, including the levy of "piggyback" taxes for counties, have also been included in the Appendix. Ala. Code 1975, Tit. 40, Chap. 12, Art. 1; Resp. Appndx. A-1. The separate state license taxes levied by the aforesaid Article 2—which constitute the bulk of the license taxes listed by the Petitioners to create the impression of the "crazy salad exemption scheme"—generally correspond to those taxes originally levied for general revenue purposes by the Tunstall Act and expanded by the 1935 Revenue Act.

A number of the state license tax provisions identified in Act No. 406 that, in 1967, would require exemptions from county taxation, namely, Sections 176, 177, 178, 180, 182, 183, 184 and 186 of Title 51 of the Code of Alabama of 1940, were the then surviving major license taxes originally imposed by the Tunstall Act on utilities and transportation companies to fund the ASETF for public education. To the extent that these license taxes have not been repealed or superseded by other taxes better adapted to modern conditions, they are now codified in Article 2 of Ala. Code 1975, Tit. 40, Chap. 21.[1] Resp. Appndx. A-113. At least as far back as the 1935 Revenue Act, counties in Alabama have been prohibited

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[1]The specific license taxes on utilities and transportation companies that were required to be exempt from county taxation under Act No. 406 are as follows: freight lines, Ala. Code 1940, § 51-176, now Ala. Code 1975, § 40-21-52; public utilities, Ala. Code 1940, § 51-177, now Ala. Code 1975, § 40-21-50; electric and gas utilities, Ala. Code 1940, § 51-178, now § 40-21-53; intrastate railroad business, Ala. Code 1940, § 51-180, recodified as Ala. Code 1975, § 40-21-57, but repealed in 1994; telephone business, Ala. Code 1940, § 51-182, recodified as Ala. Code 1975, § 40-21-58, but repealed in 1992; telegraph business, Ala. Code 1940, § 51-183, recodified as Ala. Code 1975, § 40-21-59, but repealed in 1992; and express companies, Ala. Code 1940 § 51-184, recodified as Ala. Code 1975, § 40-21-60.

from levying license taxes on utilities and transportation companies that were subject to state license taxes. Ala. Code 1975, § 40-21-64. Section 429 of said Title 51 recognizes the preemptive effect on county taxation of banks by the Financial Institution Excise Tax initially enacted as part of the 1935 Revenue Act and now codified as Ala. Code 1975, Tit. 40, Chap. 16. Resp. Appndx. A-95. This tax provides a unified state approach to the taxation of banks and, in exchange for the preemption of further county and municipal taxation of banks, provides for the sharing of the tax proceeds with counties and municipalities. § 40-16-6; Resp. Appndx. A-109. Likewise, Section 826 of said Title 51, now § 27-4-9 of the 1975 Code, merely recognizes the preemption of county taxes originally provided by the 1935 Revenue Act as part of the unified state taxation of insurance companies. Resp. Appndx. A-126.

Both the Tunstall Act and the 1935 Revenue Act reflected two state principles regarding the taxation of regulated professions that have been continued into the current state license code (Resp. Appndx. A-17), which, as explained above, provides the basis for the exemption of those professions from the Occupational Tax levied pursuant to Act No. 406. The first principle was that no portion of the state license taxes collected from professionals would be shared by the county in which such professionals were employed, nor would the county be authorized to levy a license tax on such professionals.[2] The second principle was that the state license tax should

[2]For example, compare the relevant language in the Tunstall Act relating to attorneys "Each attorney engaged in the practice of law shall pay an annual license of Fifteen Dollars ($15.00) to the State, but no license shall be paid to the county" (Ala. Acts, 1927, p. 153) with the corresponding provision of current law "Each attorney engaged in the practice of law shall pay an annual license tax to the state, but none to the county". Resp. Appndx. A-21.

be levied on the individual practitioner of a profession and not on the organization, whether corporation or partnership, that employed such practitioner.[3] Therefore, for purposes of applying the exemptions mandated by Act No. 406, it is clear that the state levies a license tax on the individual professional and not on the business organization employing such professional. Moreover, the county is specifically denied the right to impose license taxes on individuals practicing professions taxed by the state. The Occupational Tax has been structured by Ordinance No. 1120 to comply with these two principles.

As reported and analyzed by Dr. Harvey, two other developments occurred in the same time frame as the enactment of the 1935 Revenue Act that had far reaching effects on Alabama's efforts to finance public education. The first development was the enactment, in 1935, of a state income tax, as authorized by the ratification of Amendment No. 25 to the Alabama Constitution. Resp. Appndx. A-230-238. The state income tax became possible only after a long political and legal struggle. See *State v. Weil*, 232 Ala. 578, 168 So. 679 (1936). While initially committed to the retirement of an unfunded debt resulting from cumulative depression-induced deficits, in 1947 the proceeds of the income tax were earmarked for education by being constitutionally committed to the ASETF. Ala. Const., Amend. No. 61. The second important development was the enactment in 1936 and again in 1937 of general state sales taxes and the

[3]For example, compare the relevant language in the Tunstall Act relating to medical doctors "If such business is conducted as a firm or as a corporation in which more than one doctor is engaged, each doctor so engaged shall pay the license as above stated . . . " (Ala. Acts, 1927, p.155) with the corresponding provision of current law "If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license tax as above stated." Resp. Appndx. A-57.

earmarking of the proceeds thereof for education through the ASETF. Like the state income tax, the realization of the state sales tax was beset by political and legal obstacles. Resp. Appndx. A-260-273; *Nachman v. State Tax Commission*, 233 Ala. 628, 173 So. 25 (1937). The income tax and the sales tax, both of which automatically reflect economic growth, quickly overshadowed the license taxes that had initially provided the ASETF with funds for education—the same license taxes that form the basis for exemption from county taxation under Act No. 406.

As a result of post World War II economic growth and the increasing revenues generated for education by the income tax and the sales tax, as well as the growth in other revenue sources for the state's general fund, Alabama has become less and less dependent upon its business and professional license taxes. Since businesses are now routinely taxed in various ways that appeared to be neither politically nor legally available to the state during most of the two decades prior to World War II, the state license taxes have generally not been updated to increase their revenue yield. Moreover, many of the activities selected by the 1927 Legislature and the 1935 Legislature undoubtedly have an anachronistic flavor today. It is fair to say that the Alabama license code today (Resp. Appndx. A-17) represents to some degree an economic and political snapshot of an essentially rural and undeveloped state prior to World War II. The retention in the current license code of quaint, obsolete or transient activities—such as flying jennies and merry-go-rounds, fortune tellers, palmists and clairvoyants, hat cleaning establishments, dog and pony shows, exhibitions of legerdemain, lighting rod installers, mule dealers, peddlers, and transient dealers and entertainers of various kinds—undoubtedly provides the Petitioners in this case with colorful material which they have used to portray the state

license code and, conversely, the exemptions mandated by Act No. 406, as a deliberate exercise in irrationality.

The Petitioners' approach, however, overlooks several important factors. The original enactment of the state license taxes that are protected from encroachment by Act No. 406 was a rational exercise of taxing power by the Alabama Legislature in response to severe state needs. Despite the survival of quaint and obsolete activities in the state license code, most of the businesses and professions taxed thereby continue to have vitality in the state's economy and can be rationally selected for taxation without violating the equal protection clause. Finally, the state license code continues to apply to those professions, both learned and otherwise, that are regulated by the state today, and consistent with the state's history in this regard, the code continues to deny to counties the power to tax such professions.

C. Relationship of State and County Taxation in Alabama. It is significant that the Legislature has persisted for more than sixty years in denying to counties the power to levy license taxes on professions regulated by the state. Under Alabama's constitutional structure, counties are regarded as instrumentalities of the state subject to direct legislative control, while municipalities, by contrast, are to a great degree constitutionally insulated from legislative intrusion. The primary instrument for legislative control of the counties is the enactment of local laws, or population bracket general laws of local application, that in either case apply to a single county. This structure is a reflection of times, prior to the modern state, when the counties were the only local agencies through which state government could act.[4]

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[4]The political jurisdiction of a county includes all municipalities located within its geographical territory.

On the other hand, with respect to legislative control of municipalities, the Alabama Constitution contains two powerful limitations on the use of local, special or private laws: first, Section 104 absolutely prohibits the Legislature from passing local, special or private laws relating to a number of subjects, among which are the incorporation of any municipality (Ala. Const., § 104(5)) and the alteration of the government of any municipality (*Id.* § 104(18)); second, Section 105 prohibits the Legislature from passing any local, special or private law in any case that is provided for by a general law. As a consequence of historical legislative rules and practices, laws applying to a single county or other political subdivision are easier to pass than general laws. Thus, the independence of municipalities from the Legislature is protected by the relative difficulty of trying to govern their affairs through the passage of general laws.

Because of this constitutional structure and legislative approach, counties in Alabama are governed by local laws to a much greater degree than are municipalities. Municipal governments are controlled by general laws, while county governments can be customized to legislative taste by local laws. See *Baldwin County v. Jenkins*, 494 So. 2d 584 (Ala. 1986). The same dichotomy of municipal independence versus county dependence is presented by Alabama's laws with respect to local taxation. For example, all municipalities in the state are empowered to levy a general sales tax, parallel to the state sales tax, for such purposes and at such rate as may be determined by the municipal governing body. Ala. Code 1975, § 11-51-200 *et seq.* By contrast, all counties depend upon local laws (or population bracket general laws of local application) for their authority to levy sales taxes, and, in the case of the County's sales tax, both the rate of the tax and the purposes for which the proceeds may be used

are dictated by the Legislature. Ala. Acts, 1967, Act No. 405, p. 1021; Ala. Acts, 1973, Act No. 659, p. 998.

The lack of any taxing authority conferred by general law carries over into the levy of business license taxes by counties. Since 1907, every municipality in the state has possessed the power under a general municipal license statute to impose license taxes on all businesses, professions and occupations conducted in such municipality at such rates and for such purposes as may be determined by the municipal governing body. Ala. Code 1975, § 11-51-90; Resp. Appndx. A-163. The City of Birmingham, the largest city in the County, has long used the municipal license statute to levy license taxes on various business and professions, including professions, both learned and otherwise, that are regulated by the state. Since municipal taxation, unlike county taxation, has historically and constitutionally been treated as independent of state taxation, municipalities have not been prohibited from taxing the state-regulated professions. Excerpts from the Birmingham license code have been included in the Appendix to this Brief to show the relative economic burden of the Birmingham license tax on representative professions. Resp. Appndx. A-176.

The municipal license statute was first used in 1957 by a municipality to levy a general occupational tax. *Estes v. City of Gadsden*, 266 Ala. 166, 94 So. 2d 744 (1957). In 1970, the City of Birmingham, which is located within the County, used this statute to levy a one percent occupational tax, which continues in effect today and which, like the provisions of the Occupational Tax of the County challenged by Hill in this case, exempts the wages of domestic servants employed in private homes. *Jolly v. City of Birmingham*, 55 Ala. App. 603, 318 So. 2d 300 (Ala. Civ. App. 1975). Except for the exemptions mandated by Act No. 406, the Occupational Tax closely parallels the occupational tax levied by the City of Birmingham; the

city's tax ordinance, No. 70-75, is included in the Appendix to this Brief for comparison. Resp. Appndx. A-165.

By contrast with municipalities, the County had no legal authority to levy license taxes on businesses and professions until the enactment of Act. No.406. In keeping with the state control of county finances, however, the Legislature provided in the 1935 Revenue Act for a "piggyback" license tax to be levied for the benefit of each county in an amount equal to 50% of the state license taxes collected in such county. This license tax sharing arrangement continues in effect today.[5] Ala. Code 1975, § 40-12-2; Resp. Appndx A-1. In keeping with prior policy, the levy of "piggyback" license taxes for the counties did not extend to the state-regulated professions, as to which the state continued to deny the counties the power to tax.

D. Original Purpose of Act No. 406. Even though the 1935 Revenue Act levied license taxes for the County paralleling state license taxes (except with respect to regulated professions), by 1967 it had become apparent that, however comprehensive the state license code might have been in 1935, many businesses in the County did not fit into the classifications of the state license code and were therefore escaping all county license taxation. The legislatively stated purpose of Act No. 406 was "to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county." J.A. 33. For the fiscal year following the effective date of Act No. 406, the County adopted a business license code that imposed license taxes on all businesses that did not fall

[5]In 1955, the Legislature provided that the total license taxes collected in each county would be equally divided between the state and the county, even though the total collected remained at 150 percent of the base state rate. Ala. Code 1975, § 40-12-3.

within the excluded categories of Act No. 406 as explained above, namely, (i) the businesses already paying a license tax to the state and a "piggyback" license to the County, (ii) the regulated professions licensed by the state, and (iii) the utilities, transportation companies, banks and insurance companies that, going back to the Tunstall Act, had paid license taxes for the ASETF or that were subject to a unified state tax. The business license code of the County represented the first application of Act No. 406; that code, in its present form, Ordinance No. 1172, is included in the Appendix to this Brief. Resp. Appndx. A-127. Except for the excluded professionals licensed by the state and the excluded utilities, transportation companies, banks and insurance companies, the County's business license code is the reciprocal of the state license code—that which is taxed under one is not taxed under the other, but together they provide, with the noted exceptions, a comprehensive scheme of business license taxation in the County.

E. Interpretation of Ordinance No. 1120 and Application of the Occupational Tax. Like the municipalities that failed to realize until 1957 the possibility of levying an occupational tax under the general municipal license statute (Ala. Code 1975, § 11-51-90), *Estes v. City of Gadsden, supra*, the County, for 20 years, did not attempt to levy an occupational tax. Confronted by a fiscal emergency in 1988, the County recognized that, like the taxing powers of municipalities under § 11-51-90, it had the right to levy an occupational tax under Act No. 406. That right was challenged and decided in favor of the County by *Bedingfield v. Jefferson County, supra.* By the terms of Ordinance No. 1120 (J.A. 34), the Occupational Tax applies only to the privilege of employment by a natural person who is not required to pay a license tax (i) to either the state or the County under any of the license tax provisions identified in Act No. 406 or (ii) to the

County under its business license code. As succinctly and correctly interpreted by the Alabama Supreme Court in *Bedingfield*:

> Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county.

J.A. 66. The Occupational Tax applies to natural persons; it does not apply to businesses conducted by legal entities other than individual proprietorships. Ordinance No. 1120 does not exempt a natural person from the Occupational Tax unless he conducts a business as a proprietorship that is subject to a state or county license or unless he pursues a profession or occupation where he is individually required to be licensed by the state. For example, a banker or person working for a bank would not be exempted from the Occupational Tax by Ordinance No. 1120 unless, like the Rothschilds in the early 19th century, he conducted a banking business as a proprietorship, which today would not be permitted by either federal or state law. Ordinance No. 1120 exempts from the Occupational Tax only those natural persons (i) who are employed as domestic servants in private homes, (ii) who constitute a relatively inconsequential group, like peddlers, fortune tellers and entertainers, doing business as proprietorships and paying a state license tax, and (iii) who practice a state-regulated profession and who, pursuant to long-standing policy, are required to obtain licenses directly from the state. See pp. 8-9 above.

F. Incorrect Statements of the Petitioners Regarding Taxpayers Subject to the Occupational Tax. Pursuant to the express terms of Ordinance No. 1120 and the interpretation thereof expressed by the Alabama Supreme Court in *Bedingfield*, the County, without legal challenge other than this case, has been collecting the Occupational Tax from almost all natural persons employed by business entities, whether organized as corporations, partnerships or otherwise, engaged in the businesses enumerated in the Petitioners' Brief on the Merits as being favored by the so-called "exemption scheme." Pet. Br. 5-7. While such business entities do not pay the Occupational Tax, their employees most certainly do. The only employees of such business entities who are exempt from the Occupational Tax are those, such as accountants, lawyers and engineers, who practice a state-regulated profession and individually are required to obtain a state license.

To the Respondents' best knowledge, the Petitioners did not fully reveal their profound misunderstanding of the application of the Occupational Tax until the submission of their Brief on the Merits to this Court. Nowhere in the proceedings below can the Respondents find a statement—whether in the Petitioners' complaint, other court filings or their brief to the Alabama Supreme Court—that suggests, much less expresses, the Petitioners' erroneous belief that if a business entity pays a license tax to the state and is therefore exempt from further county taxation under Act No. 406, then all employees of such business entity are exempt from the Occupational Tax. There is nothing in the record of this case to justify this error; it is based entirely on the Petitioners' misreading of the applicable laws and ordinances. Admittedly, the error was first adumbrated by the sentence in the Petition for Writ of Certiorari, p. 7, that reads "It is an exemption scheme which completely *exempts* a bizarre collection of persons who happen to be employed by or as (emphasis supplied):" and is then followed by the Petitioners' list of business entities subject to state license taxes.

Only with the submission of the Petitioners' Brief on the Merits, however, was the enormity of their misconception made clear by the following statement:

> More significant even than the licensees, however, are the employees of insurance companies, express companies, railroads, banks and public utilities, who purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax. *Code of Ala.*, 1975, § 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; 27-4-9. (R.337) Pursuant to a definitional exemption grant (describing who will and will not pay its occupational tax) Ordinance No. 1120, Section 1(B), Jefferson County completely exempts, without explanation, all employees of these powerful business interests without requiring licensure, or payments of any kind to the state or the county. (R. 337)

Pet. Br. 8. This view of the Occupational Tax is completely and irremediably wrong; it appears to be based upon comprehensive and interrelated misinterpretations of the relevant state license laws, Act No. 406 and Ordinance No. 1120. Moreover, it is internally inconsistent with Richards' own complaint. On page 5 of the Petitioners' Brief it is claimed that "[t]otally exempted from the tax are persons who happen to be employed by or as:" and this claim is followed by a list of exempt business entities that, on the tenth line of the list, includes "attorneys". Since Richards is employed by attorneys as a "law firm courier" (J.A. 2; Pet. Br.5) and since, according to the Petitioners' Brief, persons employed "by or as" attorneys are exempt from the Occupational Tax, it must be concluded that Richards has contradicted the gravamen of his own complaint.

Even though the Petitioners' characterization of the "exemption scheme" of the Occupational Tax is discredited by its facial inconsistency with Richards' complaint, because of the magnitude of the error and its potential impact on the equal protection issue before this Court, the Respondents have included in the Appendix to this Brief a sworn declaration of the Director of Revenue of the County showing statistical information from the public records of the County. Resp. Appndx. A-185. Whereas the Petitioners wrongly claim that "the employees of insurance companies, express companies, railroads, banks and public utilities . . . purchase no licenses, pay nothing whatsoever to the state or the county, but receive complete exemption from the tax" (Pet. Br. 8), the truth, as demonstrated by the statistics in the exhibit to this declaration (Resp. Appndx. A-188), is that the Occupational Tax is imposed upon a large percentage of the total wages of employees of utilities, banks, insurance companies and other businesses whose employees are mistakenly claimed by the Petitioners to be exempt. The principal reasons for wages not being taxed are (i) professional licenses obtained from the state and (ii) work performed outside the County. The statistics do clearly show that smaller percentages of gross wages are subject to the Occupational Tax in the case of organizations employing licensed professionals, such as large medical clinics, accounting firms and law firms. When correctly understood as it is both written and applied, Ordinance No. 1120 taxes the employment of all natural persons except domestic servants employed in private homes, unless those persons are individually required to obtain a license from the state. To be exempt from the Occupational Tax, an individual must be required by law to obtain directly from the state an individual license; no exemption for an individual results from the mere fact that he happens to

work for a business entity that is itself exempt from county license taxation.

G. Additional License Taxes and Fees Imposed by State on Regulated Professions. The Petitioners evade the issues of whether the state has any legitimate purpose in denying to the County the power to levy a license tax on such professionals and whether the resulting exemption from the Occupational Tax is rationally related to that purpose. The Petitioners contend only that it is unfair for citizens pursuing unregulated occupations to pay the tax while successful professionals are not so encumbered; the state license tax is not a sufficient *quid pro quo* to justify exemption from the Occupational Tax. This approach ignores the fact that the state license code does not represent the full extent of state regulation nor the full measure of financial burdens associated with such regulation.

With inconsequential exceptions, all individuals directly licensed by the state and therefore exempted from the Occupational Tax by Act No. 406—including even practitioners of such non-learned professions as auctioneers, appraisers, barbers, contractors, cosmetologists, embalmers, pool hall operators and real estate brokers—are subject to comprehensive state regulatory laws. See Ala. Code 1975, Tit. 34, Professions and Businesses. With respect to all the learned professions, and to varying degrees, the non-learned professions as well, these laws create regulatory bodies with oversight responsibility, provide for examinations and initial and renewal licenses, and in general require each profession to be conducted with appropriate standards of competence and honesty for the protection of the public. The regulatory laws for these professions provide for the assessment of additional license taxes and fees that are generally devoted to defraying the cost of regulation. The increasing cost of regulation has been reflected in periodic revision of the

these laws, with the result that correspondingly little change has been made in the state license code. Resp. Appndx. A-17.

H. The Case of *Bedingfield v. Jefferson County*. After the adoption of Ordinance No. 1120 by the County Commission (September 29, 1987), but prior to its scheduled implementation, Hoyt Bedingfield ("Bedingfield"), then Director of Finance of the City of Birmingham, acting in his official capacity and as a taxpayer of the County, brought an action against the County in circuit court seeking a declaratory judgment that the Occupational Tax was invalid on several statutory and constitutional grounds. J.A.44. On November 4, 1987, additional taxpayers of the County (collectively "Phillips") filed a separate declaratory judgment against the County also challenging the validity of the Occupational Tax. J.A. 49. The actions brought by Bedingfield and Phillips were consolidated. J.A. 59.

Apart from claiming that Ordinance No. 1120 was not authorized by Act No. 406, Bedingfield challenged Act No. 406 as being in violation of both state constitutional provisions and the federal equal protection clause: "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution." J.A. 47. Phillips was more specific, stating that Act No. 406:

> constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional or nonprofessional occupations.

J.A. 52. The consolidated Bedingfield action involved the federal equal protection clause in two ways: first, as stated by Phillips, it could be argued that Act No. 406 created unconstitutional classifications of taxpayers; and second,

it could be argued that since Act No. 406 applied only to counties of more than 500,000 in population, it made an irrational classification among Alabama cities in expanding the County's taxing power.[6] Although the Bedingfield plaintiffs raised the first equal protection argument in their complaint, they appear to have neglected it in favor of the second argument. J.A. 54. Whether as the result of neglect or unpersuasive arguments, the trial court upheld the Occupational Tax in an order that expressly addressed the second argument but failed to discuss whether the exemptions from the tax reflected an impermissible classification of taxpayers under the equal protection clause. J.A. 60.

On appeal to the Alabama Supreme Court, the Bedingfield plaintiffs raised the issue of federal equal protection, but again focused their attention on the argument that Act. No. 406 unconstitutionally differentiated between Jefferson County and other counties in the state. R. 272-75. The Alabama Supreme Court was not unaware of the equal protection argument concerning the taxpayer exemptions because it was presented by the amicus brief filed by the Alabama AFL-CIO (R. 289). Nevertheless, the Court upheld the Occupational Tax in an opinion that expressly addressed all state law issues and the equal protection challenge to the population classification of Act. No. 406, but without discussing whether the

[6] *Peddycoart v. City of Birmingham*, 354 S.2d 808 (Ala. 1978), infused new vigor in the state constitutional barriers to local acts masquerading as general acts by reason of population classifications. It recognized the utility, however, of preserving certain open population bracket laws against such barriers, provided that the population classifications were rationally related to a legitimate purpose. Thus, in order to avoid being a local law under the Alabama Constitution, and therefore subject to certain specific constitutional restrictions, *Peddycoart* required the population classification of Act No. 406 to pass muster under the federal equal protection clause.

exemption of state-regulated professions violated the federal equal protection clause. J.A. 65.

In reliance upon the holding of *Bedingfield v. Jefferson County*, the County has collected and spent the Occupational Tax, which has been continuously in effect since January 1, 1988. Moreover, the County in 1989 pledged proceeds of the tax to the Birmingham-Jefferson County Civic Center Authority (the "Authority") in an annual amount of $10,000,000 for 20 years. Those pledged proceeds, together with $3,000,000 per year pledged by the City of Birmingham from its occupational tax, constitute the sole source of payment of the Authority's 1989 capital improvement bonds now outstanding in the amount of $109,915,000.

I. The Proceedings Below. On April 21, 1992, Richards and Hill, together with George David Dykes and Joan Foley Dykes (together, the "Dykes"), who are employees of the United States, commenced this case in circuit court as a class action against the County and the County's Director of Revenue, pursuant to 42 U.S.C. § 1983, challenging the validity of the Occupational Tax on various federal and state constitutional and statutory grounds.[7] J.A.1. Richards and Hill claim to represent all citizens who are not federal employees and who are subject to the Occupational Tax, while the Dykes claim to represent all federal employees who are subject to the Occupational Tax. All the plaintiffs alleged that their liability for the tax violated the federal equal protection clause of the United States Constitution and the due process and equal protection provisions of the Alabama Con-

[7] On August 19, 1991, the same plaintiffs brought a case in the United States District Court asserting claims identical to those asserted in this case. The federal case was dismissed on April 15, 1992, on the grounds that it was barred by the Tax Injunction Act, 28 U.S.C. § 1341. *Richards v. Jefferson County*, 789 F. Supp. 369 (N.D. Ala. 1992), aff'd without opinion, 983 F.2d 237 (11th Cir. 1992).

stitution. J.A. 10, 11, 13. In addition, the Dykes alleged that their liability for the tax violated 4 U.S.C. 111 requiring nondiscriminatory state and local taxation of federal employees and state law pertaining to the taxation of federal employees. J.A. 9, 12. The Authority moved to intervene because of its interest in the Occupational Tax as the source of payment of its bonds. J.A. 22. The County moved for summary judgment on the ground that *Bedingfield* constituted a *res judicata* bar to further litigation of all claims (other than those under 4 U.S.C. § 111). The trial court ultimately granted summary judgment against all plaintiffs on the state law claims, but it denied summary judgment with respect to their federal constitutional claims, as well as the Dykes' claim under 4 U.S.C. 111. J.A. 105.

In response to the County's request for certification of questions for an interlocutory appeal (J.A. 99; Ala. R. App. P. 5), the trial court certified the following: (i) whether the federal constitutional claims of the plaintiffs were barred by *res judicata* and (ii) whether Act. No. 406 denied the plaintiffs the equal protection of the laws under the United States Constitution. J.A. 106. In deciding the interlocutory appeal, the Alabama Supreme Court held that *res judicata* barred further litigation of the plaintiffs' federal constitutional claims, pretermitting any consideration of the equal protection question. J.A. 110. Richards and Hill filed a petition for a writ of certiorari with this Court seeking review of (i) the Alabama Supreme Court's decision that the Petitioners' federal constitutional claims were barred by *res judicata* and (ii) a determination as to whether the exemptions from the Occupational Tax warrant further litigation on equal protection grounds. This Court granted the petition with respect to both isues.

SUMMARY OF ARGUMENT

It is well established that a prior judgment obtained by private citizens should be given preclusive effect with respect to subsequent litigation by different private citizens if the prior litigation does not involve any private interests, the right sought to be enforced is a public right, and the people are regarded as the real party in interest. Privity between the prior litigants and those precluded from litigation of the same public issue is created by their identity of interest in the public issue. The equal protection claims raised by the *Bedingfield* plaintiffs concerning the exemptions from the Occupational Tax caused such claims to be decided in *Bedingfield*, even though the trial court and the Alabama Supreme Court failed to discuss the claims in their opinions. The Petitioners cannot claim any private right with respect to their equal protection claims that differentiate them from the *Bedingfield* plaintiffs or any other taxpayers, and this identify of interest creates the necessary privity to preclude further litigation of their equal protection claims in this case.

Legislative bodies such as the County hold broad power — to be exercised in their discretion — to make classifications for tax purposes. Such is the deference due that exercise of legislative discretion that a tax-related classification will not be disturbed by this Court if there is any conceivable basis on which to sustain it. That rule is well-established, has often been applied by this Court, and is controlling in this case.

Although the taxpayer bears the heavy burden of eliminating every conceivable basis that may lawfully have animated the challenged legislation, the Petitioners have offered the Court only inapposite judicial authority and conclusory assertions in pursuit of that burden. Richards has not identified any act of invidious discrimination, nor has he offered relevant authority or analysis, to support and explain his assertions.

Finally, there are a number of conceivable bases legitimizing the classification decisions attacked. The establishment of the Occupational Tax involved, essentially, only a judgment to tax all natural persons not already so taxed. The Legislature acted with reference to an existing set of circumstances, and they acted reasonably in light of those circumstances. Additionally, the business and professional licensing tax law developed reasonably, with a plausible purpose behind every aspect of it. Finally, the distinction made between state-regulated professionals and other employees in Jefferson County, in addition to being a classical exercise of the discretionary classification power, can be justified from several conceivable perspectives, including the decision of the state to retain exclusive regulatory control over the learned professions, as well as other professions historically regulated by the state.

ARGUMENT

I. ***Bedingfield v. Jefferson County* should bar the Petitioners from further litigating whether the exemptions from the Occupational Tax violate the equal protection clause of the United States Constitution.**

The *res judicata* issues of this case put the Respondents in mind of Mr. Justice Holmes' opening observations in his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

From the perspective framed by their risks, this is certainly a case of "great" importance for the County and the Authority. The very pendency of the case has caused outstanding obligations of both the County and the Authority to be scrutinized by the national rating services and, in the case of the Authority, to be placed on the rating services' credit watch. If the Occupational Tax is ultimately determined to be constitutionally invalid, the County will lose more than one-third of the revenues for its general fund, and it will face the prospect of refunding more than $273,000,000 in Occupational Taxes that, within the applicable statute of limitations, have been collected and spent on diverse functions of government.

There is simply no way that the County could meet its current governmental responsibilities, while at the same time absorbing the loss of the Occupational Tax and financing a refund of the cumulative taxes collected and spent since January 1, 1988.[8] In the event of the loss of the $10,000,000 per year of Occupational Taxes that the County has pledged for the payment of the Authority's bonds, the Authority will simply have to default in the payment of these bonds, for it has no taxing authority and derives no significant income from a Civic Center that was built not for financial profit but to promote the economic and cultural development of the Birmingham-Jefferson metropolitan area. The greatness of this case is

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[8]Alternatively, the County might remedy the retroactive effect of an invalidation of the Occupational Tax, *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), by "withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989). This would involve the daunting political challenge of persuading the Alabama Legislature to impose retroactively the Occupational Tax on the cumulative compensation received by professionals working in the County since January 1, 1988, as well as abandoning for the future the long-standing policy of denying counties the power to levy license taxes on such professionals.

in the ruin that its outcome could visit on the County and the Authority.

In fairness, however, the Respondents recognize that this case is also a "hard" case in the sense that it potentially puts into conflict several fundamental principles deeply embedded in this nation's jurisprudence: first, the concept of due process of law that assures everyone his own day in court and does not allow his personal rights to be concluded by proceedings in which he was neither a party nor represented; second, the continued coherence of the doctrine of *res judicata* which reduces litigation and fosters confidence in the judicial process by safeguarding the reliability of judgments; and, third, the need for finality concerning the legal validity of revenue sources for state and local governments, especially in the complex contemporary world where citizens depend upon reliable governmental budgets for their livelihood, health and safety and where investors in a global market buy and trade municipal securities without opportunity for constant inquiry into their underlying legal risk.[9] By adverting to the great and hard nature of this case and by recalling Mr. Justice Holmes' observation about the associated risk of bad law, the Respondents do not suggest, by any means, that the judgment of the Alabama Supreme Court in this case is bad law. On the contrary, that judgment clearly reaches the correct result in the particular circumstances of this case, even if there is arguably some evidence of the "hydraulic pressure" for which Mr. Justice Holmes had a cautionary concern.

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[9]To some degree, concern for this last principle appears to have animated Congress in the enactment of The Tax Injunction Act, 28 U.S.C. § 1341, which this Court has described as "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 522 (1981).

In its decision in this case, the Alabama Supreme Court followed well established precedent, both in Alabama and many other states, to the effect that, in the absence of fraud or collusion, a citizen can obtain a binding judgment on all other citizens in a case where no private interest is involved, the right sought to be enforced is a public right, and the people are regarded as the real party in interest. *Town of Tallassee v. State ex rel. Brunson*, 206 Ala. 169, 89 So. 514 (1921); *City Council of Montgomery v. Walker*, 154 Ala. 242, 45 So. 586 (1908). With respect to the vital question of how the first party in such litigation can bind a party who subsequently attempts to litigate the same public issue, the answer has been that the privity of the parties results from their identity of interest in the same public question. Whether called virtual representation or identity of interest, the privity between the parties for purposes of *res judicata* is pragmatically established by recognizing that no real due process interest is served by permitting a public issue, once adequately adjudicated through the competent efforts of bona fide adversaries, to be subsequently relitigated by other parties who have the same interest in the question and will be affected by the outcome in the same way.

The decisions of many state courts agree with the Alabama cases.[10] The rule of privity commonly applied in such cases is well expressed by the Supreme Court of Georgia:

> Where a taxpayer or property owner brings an action against a county or its officers upon a matter of public and general interest to all

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[10]*E.g., El Paso Natural Gas Co. v. State*, 599 P.2d 175 (Ariz. 1979); *Wells v. Heath*, 602 S.W.2d 665 (Ark. 1980); *Howard-Sevier Road Imp. Dist. No. 1 v. Hunt*, 265 S.W. 517 (Ark. 1924); *Farncomb v. City and County of Denver*, 171 Pac. 66 (Colo. 1918); *Johnson v. City of Alma*, 149 S.E.2d 661 (Ga. 1966); *Holman v. Bridges*, 140 S.E. 886 (Ga. 1927);

> other taxpayers of such political subdivision, and the action either expressly or by necessary implication is on their behalf, they are equally bound by the adjudication and a judgment is a bar to any subsequent proceeding by them or any of them seeking similar relief upon the same facts.

Johnson v. City of Alma, 149 S.E. 2d 661, 663 (Ga. 1966). Recognizing the necessity for a different approach when a private right of a citizen may be involved in subsequent litigation, the Supreme Court of Ohio stated the principle as to matters of general public interest as follows:

> Appellant essentially argues that as a taxpayer he has a private right, independent of the Bratenahl board of education, to relitigate the same public issue determined against the board. This may be true where causes of action are not the same or where the taxpayer has a different private right not shared in common with the public; however, a judgment for or against a governmental body is binding and conclusive as

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Riley v. Maloney, 499 N.W. 2d 18 (Iowa 1993); *People ex rel. Castle v. Wright*, 134 N.E.2d 269 (Ill. 1956); *Harmon v. Auditor of Public Accounts*, 13 N.E. 161 (Ill. 1887); *Ahlquist v. Commonwealth Electric Co.*, 261 N.W. 452 (Minn. 1935); *Kaufer v. Ford*, 110 N.W. 364 (Minn. 1907); *Seibert v. City of Columbia*, 461 S.W.2d 808 (Mo. 1970); *Powell v. City of Joplin*, 73 S.W.2d 408 (Mo. 1934); *Drainage Dist. No. 1 Reformed v. Matthews*, 234 S.W.2d 567 (Mo. 1950); *State ex rel. Sullivan v. School Dist. No. 1*, 50 P.2d 252 (Mont. 1935); *Roberts v. Goldner*, 397 A.2d 1090 (N.J. 1979); *Gardiner v. City of Jersey City*, 170 A.2d 820 (N.J. Super 1961); *Anderson v, Jeannotte*, 96 N.W.2d 591 (N.D. 1959); *State ex rel. Davis v. Willis*, 124 N.W. 706 (N.D. 1910); *City of El Reno v. Cleveland-Trinidad Paving Co.*, 107 Pac. 163 (Okla. 1910); *City of Cincinnati ex rel. Crotty v. City of Cincinnati*, 361 N.E.2d 1340 (Ohio 1977); *Stromberg v. Bd. of Ed. of Bratenahl*, 413 N.E.2d 1184 (Ohio 1980); *State ex rel. Brophy v. City of Lakewood*, 41 N.E.2d 856 (Ohio 1942); *Sica v. City of Philadelphia*, 465 A.2d 91 (Pa.Cmwlth. 1983); and *Stallcup v. City of Tacoma*, 42 Pac. 541 (Wash. 1895).

> *res judicata* on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.

Stromberg v. Bd. of Ed. of Bratenahl, 413 N.E. 2d 1184, 1186 (Ohio 1980).

Since this doctrine of virtual representation deviates from the general rule that a judgment binds only parties before the court, or those who by participation, legal accountability or successive interest can justly be deemed in privity with such parties, the use of the doctrine to justify *res judicata* in a particular case "demands the utmost caution." *El Paso Natural Gas Co. v. State of Arizona*, 599 P.2d 175, 178 (Ariz. 1979). In the present case, the Petitioners contend that their federal constitutional claims cannot be barred by *Bedingfield* because the taxpayers in that case did not raise, and the court did not decide, whether the exemption of certain classes of taxpayers from the Occupational Tax violated the equal protection clause. Assuming arguendo the requisite privity between the *Bedingfield* plaintiffs and the Petitioners, the Alabama Supreme Court, after speculating that the claims were actually litigated because they had been raised in the *Bedingfield* complaints, definitively solved the problem by invoking the claim preclusion breadth of *res judicata*, which would bar the Petitioners from further litigating not only the matters actually decided but all other "legal theories and claims arising out of the same nucleus of operative fact." J.A. 114. Claim preclusion forces the prior litigant to present all evidence, theories, arguments and remedies related to his cause of action on pain of subsequent forfeiture. *Nevada v. United States*, 463 U.S. 110 (1983); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927). While this rule is fair and reflects good policy where the forfeiting party is the prior litigant or his clear privy, it arguably goes too far in circumstances, such as this case, where privity between *Bedingfield* and the Peti-

tioners results only from the identity of interest in a particular public question.

A. Due process would be better served by using issue preclusion rather than res judicata to bar further litigation of the Petitioners' equal protection claims.

Without changing the result, the decision of the Alabama Supreme Court in this case would be more defensible under due process standards if it were interpreted as barring further litigation of the Petitioners' equal protection claims on the basis of issue preclusion. Even though the Petitioners may escape the broadside effect of *res judicata*, their effort to relitigate the public issue of whether the Occupational Tax violates the equal protection clause—an issue applying to them, to the *Bedingfield* plaintiffs, and to all county taxpayers in the same way—should be barred if that issue was actually decided in *Bedingfield* and was necessary to support the judgment in that case.

The issue of equal protection covering the exemptions from the Occupational Tax was clearly raised in the consolidated *Bedingfield* complaint, but the Petitioners argue that it was not decided because neither the trial court nor the Alabama Supreme Court addressed it in their written opinions. The identical argument was considered by the Court in *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 477 (1930):

> But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it.

As is clear from the Court's disposition later in the opinion of a claim not raised in the prior proceeding, the above quoted language is not merely another way of phrasing the claim preclusion of *res judicata*, but is rather a rule for determining whether an issue was actually decided. The same rule for determining issues actually decided was more memorably expressed by Judge Goodrich in *United States v. Silliman*, 167 F.2d 607, 617 (3rd Cir. 1948):

> It actually does not matter whether such evidence was presented or not. If an issue is raised and the party who has the burden fails in his proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented a barrel of testimony. A man cannot offer his cake and expect to keep it in litigation any more than anywhere else.

Bedingfield clearly decided that the exemption classification of the Occupational Tax did not violate the equal protection clause, and the Petitioners are bound thereby if their interest in that issue is identical to that of the *Bedingfield* plaintiffs.

B. For purposes of precluding further litigation of the federal equal protection claims, the Petitioners are in privity with the Bedingfield plaintiffs.

No one would dispute the fairness or good sense of the principle vindicated by *Martin v. Wilks*, 490 U.S. 755 (1989), "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. The Petitioners would certainly be protected from the preclusion of their federal equal protection claims in this case if they could demonstrate any conceivable set of facts that would make their claims any different than the claims of other taxpayers who pay the Occupational Tax and object to its exemptions. They cannot, however, dif-

ferentiate their claims from those of the *Bedingfield* plaintiffs or any other taxpayers. Permitting them to circumvent the bar of *Bedingfield* by claiming an illusory private right will create opportunity for wasteful litigation that is not required by due process of law.

In their complaint the Petitioners acknowledge that they have no private rights or claims with respect to the Occupational Tax that arise under the equal protection clause and that are different from the rights and claims of other taxpayers. With respect to their right to represent all taxpayers, the Petitioners assert:

> There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

J.A. 4. They further claim that the claims of all taxpayers "depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each" and that "[t]here is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein." J.A. 4. Two observations are in order. First, since the *Bedingfield* plaintiffs are included among the taxpayers which the Petitioners purport to represent, there is an explicit acknowledgment that their interests are the same as the *Bedingfield* plaintiffs. That means that if the Petitioners are given the right to relitigate, *res judicata* means nothing with respect the *Bedingfield* plaintiffs. Second, if the Petitioners do have any private right that requires a separate day in court, how can they be sure that it does not conflict with the private rights of the thousands of anonymous taxpayers they seek to represent? The certainty of no conflict is the logical equivalent of the nonexistence of any separate private right.

The petitioners' own statements squeeze the life out of any possibility that they have a separate private right in this case. They cannot escape that consequence by claiming that these statements merely represent the usual rubric for justifying the certification of a class. An earlier class action in lieu of *Bedingfield* would certainly have had the same preclusive effect. Due process, however, does not require that only class actions are to be given preclusive effect in the litigation of purely public issues. *Sica v. City of Philadelphia*, 465 A.2d 91 (Pa. Cmwlth 1983). Where there is no possibility of a distinction between the public issue and a private right, the notice and opt-out features of a class action will have no significant due process value. Oversight by the court in a class action to assure adequacy of representation would have genuine value, but that concern can be addressed retroactively when a court evaluates whether a prior judgment should be given preclusive effect. In *Bedingfield*, the resources of the City of Birmingham and its active interest in thwarting a rival occupational tax assured an adequate and adversarial representation of the *Bedingfield* plaintiffs.

The federal courts in appropriate circumstances have also recognized that privity for purposes of preclusion can also be derived from an identity of interest with respect to a public issue uncontaminated by any cognizable private right. *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir.), cert. denied, 434 U.S. 832 (1977); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

As a conclusion to the *res judicata* issues in this case, it should be noted that there is no merit in the argument that Richards and Hill would have had no standing to challenge the Occupational Tax during the period that *Bedingfield* was litigated. *Eagerton v. Williams*, 433 So.2d 436 (Ala. 1983), does not support the position for which it is cited. Under Alabama law, a declaratory judgment to declare a tax invalid can be maintained by a targeted

taxpayer prior to the effective date of the tax. *Hunt v. Chemical Waste Management*, 584 So.2d 1367 (Ala. 1991), rev'd on other grounds, 504 U.S. 334 (1992).

II. The classifications made by the State of Alabama and by Jefferson County are well within the latitude enjoyed by state and local governments in matters involving taxation.

The County is also due to prevail on the merits of Richards' equal protection claim. A reviewing court may affirm the decision below on any proper ground, whether or not the ground was considered by the lower court. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The absence of a factual record poses no legal or prudential barrier to this Court's resolution of the equal protection issues because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993).

A. Legislative bodies enjoy wide latitude in making classifications for purposes of taxation, and the courts must accord extraordinary deference to such legislative classifications.

One hundred and six years ago, this Court laid down the bedrock principles that govern this case. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890). There, the Court considered an equal protection attack on a statute that taxed some securities based on their actual value, but other securities based on their par value. Rebuffing that attack, the Court recognized the legislative power—and the broad discretion afforded legislative bodies in exercising that power—to create classifications for purposes of taxation:

> [The equal protection provision of the Fourteenth Amendment] was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. . . . It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature. . . .

134 U.S. at 237. The Court has applied those principles consistently: *Kehrer v. Stewart*, 197 U.S. 60, 69 (1905) ("As we have frequently held, the state has the right to classify occupations, and to impose different taxes upon different occupations."); *Armour Packing Co. v. Lacy*, 200 U.S. 226, 235 (1906) (Equal protection does not prevent a state, "through the undoubted power of classification, [] impose different taxes upon different trades and professions."); *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 121 (1910); ("In its discretion, [a state] may tax all, or it may tax one or some"); *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1931) ("equal protection of the laws does not . . . prevent variety or differences in taxation, or discretion on the selection of subject, or the classification for taxation of properties, businesses, trades, callings, or occupations."); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) ("the State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products").

The broad, discretionary power of legislatures to make classifications applies in all areas of social and economic policy, but "in taxation, even more than in other fields,

legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). This is true "particularly as respects occupation taxes." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938) (emphasis added).

Complementing the broad latitude accorded the state in establishing taxation classifications is the very limited, very deferential, standard of judicial review. "[E]very presumption should be indulged in favor of the constitutionality of the legislation." *Bradley v. City of Richmond*, 227 U.S. 477, 485 (1913). The presumption must be honored "if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916). "It is not the function of [the] Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation." *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1931). Instead, as stated in *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."

The classifications that the Court has upheld in the face of equal protection challenges give substance to the foregoing principles. For example, the Court has upheld: a taxing scheme that differentiated between railroad property and the property of corporations chartered for different purposes, *Kentucky R. Tax Cases*, 115 U.S. 321 (1885); a law requiring a license fee for grain warehouses and elevators situated on railroad right-of-ways, but not for grain elevators and warehouses differently situated, *W.W. Cargill Co. v. Minnesota*, 180 U.S. 452 (1901); a law imposing a tax on the business of hiring persons to labor

outside the state but not on the business of hiring persons to labor within the state, *Williams v. Fears*, 179 U.S. 270 (1900); a business tax applicable to hand laundries but not to steam laundries, *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); a tax imposed on merchants offering coupons but not on other merchants, *Rast*, 240 U.S. 342; and a tax placed on anthracite coal that was not placed on bituminous coal, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). These examples justify the Court's observation in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (an equal protection challenge to Alabama's unemployment compensation tax) that it had "repeatedly held inequalities which result from a singling out of one particular class for taxation or exemption, [to] infringe no constitutional limitation".

The principles enunciated in *Bell's Gap* and its progeny remain vibrant today:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, the statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993). "[A]bsent a reason to infer antipathy . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2336 (1992). Accordingly, a "statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support

it, whether or not the basis has a foundation on the record." *Heller v. Doe by Doe*, 113 S.Ct. 2637, 2643 (1993).

B. The decisions upon which the Petitioners rely turn on factors not present in this case.

Having failed to find a single favorable decision of this Court that is materially on point, the Petitioners have been forced to rely on case law that is inapposite because the outcomes were governed by considerations not present in this case. In each of those cases, for any of several reasons, the Court engaged in more sweeping scrutiny—albeit under what was stated to be a rational-basis test—than is appropriate in cases, such as this, involving local occupational tax legislation.

The equal protection clause does not exist in a vacuum; its protection against discrimination varies substantially in force and effect depending on the circumstances underlying the challenged discrimination, the nature of the benefit or burden that is the subject of discrimination, the manner in which the discrimination is created and applied, and the rationale underlying the discrimination. The existence of differing degrees of scrutiny under the equal protection clause—strict, intermediate, and rational-basis—confirms the Court's recognition that the rights protected are considered to be of varying importance. Strict and intermediate scrutiny have relatively limited application to certain suspect classifications or to fundamental rights of great importance in a free society. On the other hand, the degree of scrutiny applied under the rubric of "rational-basis" may vary discernibly according to the interests at stake and the nature of the classification. "[T]he standard of rationality as we have so often defined it must find some footing in the realities in the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. Thus, the "rational-basis" inquiry will differ in scope—and result—according to the

context; rational reasons for classifications based on occupation may be considered irrational, or illegitimate, for classifications based on state of residence.

The concept of a fluid rational-basis standard is exemplified by the Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), on which the Petitioners rely. *Ward* involved a challenge to Alabama's practice of levying a higher gross premiums tax on out-of-state insurance companies than that levied on domestic insurance companies. The trial court, affirmed by the Alabama Supreme Court, upheld the taxation scheme on the basis, inter alia, that the disparity of classification was intended to further the legitimate purpose of encouraging the formation of new insurance companies in Alabama. On review in this Court, a majority reversed and remanded the Alabama Supreme Court's decision. The Court held "that promotion of domestic business within a State," if accomplished by discriminating against foreign corporations, "is not a legitimate state purpose." 470 U.S. at 880. The Court reached that conclusion while at the same time agreeing "with the holding in *Allied Stores* [358 U.S. 528] that "a State's goal of bringing in new business is legitimate and often admirable." 470 U.S. at 879.

Despite the occasional disclaimer to the contrary, this Court's jurisprudence clearly recognizes and applies varying levels of rational-basis scrutiny—depending on the right implicated or the classification made. When the constitutionally-protected and fundamental "right to travel" is involved for example, the Court's "cases leave no doubt that it will trigger intensified equal protection scrutiny." *Zobel v. Williams*, 457 U.S. 55, 66 n.1 (1982) (Brennan, J., concurring). At the other end of this spectrum, there are local economic regulations. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particu-

lar statutory discriminations." *Zobel*, 457 U.S. at 81 (Rehnquist, J., dissenting).

Each of the cases upon which the Petitioners rely involved factors—either the nature of the classification made or the constitutional significance of the rights implicated—that required closer rational-basis scrutiny than would be applicable to run-of-the-mill occupational taxes such as the one involved here. Those cases do not represent an application of the rational-basis standard as limited as that which this Court has consistently applied in cases addressing social and economic matters implicating no constitutional interest or policy other than the equal protection clause—the right to be treated the same as others in the applicable class. As we have seen, the result in *Ward* was directly attributable to the discrimination against residents of other states, an abrogation of constitutional policy not alleged in this case.

The decision in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), is equally inapposite, and for the same reason. In that case, the Court condemned, on equal protection grounds, a refusal to grant an out-of-state, nonprofit corporation a tax exemption automatically enjoyed by domestic nonprofit corporations. Again, although addressed under the rubric of rational-basis equal protection, the case turned on the different and less favorable treatment of the out-of-state, nonprofit corporation "solely because of [its] foreign incorporation." *Id.* at 120.

The Court's decisions in *Zobel v. Williams*, 457 U.S. 55 (1982), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), are essentially comparable to each other. On the other hand, both are profoundly different from this case with respect to the constitutional rights at issue. *Zobel* and *Hooper* both involved state laws that discriminated between citizens of a state based on the longevity of their residence in derogation of the constitutional protection of national citizenship—a citizenship with fundamental rights that do not vary from state to state.

In *Zobel*, the Court sustained a constitutional challenge to the State of Alaska's decision to bestow certain benefits that increased in proportion to the length of residence in the state. The Court held that a purpose to favor established residents over new residents is a constitutionally unacceptable one. 457 U.S. at 65. A majority of the Court felt it desirable to remark further so as to provide a more comprehensive analysis to justify the result. Justice Brennan, concurring on behalf of himself and three other Justices, emphasized the pivotal role of the so-called "right to travel" that, although of less than certain origin, is well established as a fundamental, constitutionally protected right "that will trigger intensified equal protection scrutiny." 457 U.S. at 66 n.1. Also of importance to Justice Brennan's concurrence was the recognition that a scheme of classification based on length of residence would inevitably lead to the constitutionally impermissible conclusion that some citizens are more equal than others. Justice O'Connor, concurring separately, was equally adamant in recognizing the important and "fundamental" nature of the right to travel. "It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State." 457 U.S. at 76 (O'Connor, J. concurring).

The right to travel was also the foundation of the Court's analysis in *Hooper*, 472 U.S. 612. In that case, a New Mexico statute granted a $2,000 property tax exemption to Vietnam veterans who had resided in the State prior to a certain date but offered no exemption to Vietnam veterans who established residence after that date. Predictably, the statute was invalidated on the authority of *Zobel*. Again, the Court condemned the statute for its capacity to stigmatize late-comer veterans as "sec-

ond-class citizens." 472 U.S. at 623.[11] In any event, both *Hooper* and *Zobel* reflect the higher level of rational-basis scrutiny that will be employed when fundamental constitutional rights—above and beyond those granted by the equal protection clause—are adversely affected by a state's classification decision.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1983), presents a somewhat different situation. In *Cleburne*, the Court, while purporting to apply rational-basis scrutiny, looked very closely at the extent and nature of the discriminatory classification and the putative justifications for it. *Cleburne* involved a challenge to a municipal zoning ordinance that permitted, without restriction, such uses as apartment houses, boarding and lodging houses, fraternity and sorority houses and dormitories, apartment hotels, hospitals, sanitariums, nursing homes or homes for convalescents or aged, private clubs, fraternal orders, and accessory uses customarily incident to any of the above listed uses. 473 U.S. at 436 n. 3. In contrast, the following uses were permitted only by acquisition of a special permit: hospitals for the insane or feebleminded, or alcoholics, or drug addicts, or penal or correctional institutions. Cleburne Living Centers ("CLC") intended to operate a planned group home for the mentally retarded. The City classified the home as requiring a permit on the basis that it should be considered a hospital for the "feebleminded." The City then refused to issue the necessary permit. The Court, per White, J., concluded that rational-basis scrutiny was appropriate but then proceeded to review very closely the City's stated purposes in requiring a license in the first place and then denying the home's application for one. Showing little of

[11]One also senses in the Court's analysis an underlying discomfort with the notion that veterans who had fought for the nation could thereafter be classified for purpose of benefits according to their state of residence. 472 U.S. at 623.

the deference ordinarily required under a rational-basis review, the Court made short shrift of the City's stated purposes and concluded that "this case appears to us to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450. Justice Stevens, for himself and the Chief Justice, concurred, saying that he was convinced from the record that the permit requirement resulted from "the irrational fears of neighboring property owners," a constitutionally insufficient reason. 473 U.S. at 455. Three Justices, in partial concurrence and partial dissent, opined (and not without reason) that the plurality had invalidated the City's ordinance "after subjecting it" to precisely the sort of probing inquiry associated with heightened scrutiny. At bottom, the degree of scrutiny actually employed, and by whatever name fairly described, was going to be sufficient to remedy the transparent discrimination of the City against mentally retarded people. Consequently, such a decision holds very little persuasive value with regard to applying an appropriate standard of review and has no relevance to this case, which involves local taxing classifications only.

The last case on which the Petitioners place any appreciable reliance is this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). The tax assessor of Webster County, West Virginia, relied on most recent sales prices for tax purposes. The result was wildly disparate valuations of comparable properties. In striking down the practice, the Court did not decide the legitimacy of a transaction-price based assessment method because the state of West Virginia had never adopted such an assessment procedure. To the contrary, the Constitution of West Virginia guaranteed equal and uniform taxation throughout the state on both real and personal property, which was to be taxed in proportion to its value. The Webster County tax assessor was following his own "aberrational enforcement policy." 488 U.S.

at 344. Consequently, the Court's reasoning is not likely to be useful in cases where the state law has been followed on its terms, especially after the decision in *Nordlinger*, 112 S. Ct. 2326.

C. The classification determining the natural persons who would be subject to the Occupational Tax does not violate equal protection.

The equal protection claims in this case appear to be based only on assertions that the Occupational Tax and its exemptions are "cockamamie." At bottom, this claim seems to be nothing more than a bald assertion that Richards ought not to be required to pay occupational tax if anyone else is exempt therefrom. This Court resolved that issue over a hundred years ago in *Bell's Gap*.

This Court has repeatedly held that only "clear and hostile discriminations against particular persons and classes" are forbidden by the equal protection clause. *E.g., Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 255 (1922); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The equal protection clause forbids only distinctions or discriminations that are "palpably arbitrary" or "insidious." The County enjoys a presumption of constitutionality that "can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Madden*, 309 U.S. at 88.

Because Richards has failed to suggest that any actionable disparity between similarly situated people results from the County's classification, the equal protection analysis need go no further. However, there are plausible reasons for the configuration of the Occupational Tax.

As explained in the Statement, the County's taxing authority is derived from Act No. 406 of the Alabama Legislature. The most fundamental reason for the classifications is that the Legislature, acting well within its discre-

tion, concluded that the natural candidates for county business and occupation taxes were businesses and natural persons not already subject to an occupation or business tax assessed by the state or the County. The broad group of employees that the County could ultimately tax already existed as a classification—the class of employees then exempted from existing state and county taxes. Under those circumstances, a more logical and reasonable classification can scarcely be conceived. The Court, in fact, has on several occasions noted with approval that a challenged classification was predicated on a classification already in existence. A "[v]alid reason" for an excise tax statute establishing two classifications of utilities for tax purposes "appears from the fact that the [challenged] laws merely adopted the classification previously established" under New York law. *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 580 (1938). To like effect is *FCC v. Beach Communications*, 113 S.Ct. at 2103 ("Congress borrowed [the challenged classification] from pre-Cable Act regulations, and although the existence of a prior administrative scheme is certainly not necessary to the rationality of the statute, it is plausible that Congress also adopted the FCC's earlier rationale.").

The Court addressed circumstances quite like those of the County in *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941). In that case, the Court quickly disposed of a claim much like that made here by Richards. The tax at issue was "but one portion of a comprehensive scheme of taxation." 313 U.S. at 120. The Court also noted that the complainants, but for the new tax they were challenging, would be the only vendors in the state to escape some form of taxation. *Id.* at 120-121. Here, as there, it is perfectly rational to impose a tax on only those natural persons previously exempted from all occupational license taxes.

The County has explained in detail above the manner in which the Alabama business and professional license tax code—upon which the Legislature predicated Act No. 406 in 1967—came into existence in response to specific financial and other needs. One might question the wisdom of designing a tax scheme like that developed in Alabama over a period of almost 70 years, but: there is no basis upon which to find it unconstitutional, either as it is configured now or as it was developing in the past.

As discussed in the Statement, the only sizable class of natural persons who are not subject to the Occupational Tax comprise the state-regulated professions, of which the learned professions have the greatest economic significance. There are several readily conceivable, logical bases on which to treat the learned professions as a distinct class for purposes of taxation. First, professions are regulated by the State of Alabama. The opportunity to tax necessarily carries with it the opportunity to bury the taxpayers in forms and regulations. The Alabama legislature could have quite reasonably concluded that it did not want any interference from the County in regulating the professions. Another justification for the exclusion of professionals from a local occupational tax is to avoid giving those professionals a reason to disperse to other counties. The State has a conceivable and legitimate interest in insuring that the professional people in its largest metropolitan area stay in they area so as to continue to provide civic leadership and interact for the benefit of the area.

With respect to Hill individually, she presumably contends that her position as a custodial worker in a commercial setting is comparable to the position of a domestic servant working in a private home. A reasonable basis for the exemption of domestic servants working in private homes is that the administration and expense involved in collecting and accounting for the tax would

likely exceed the tax collected. The Court has recognized administrative expense and convenience as a legitimate purpose for classification on several occasions. *Carmichael*, 301 U.S. at 511.

Yet another reason for the exemption of domestic servants working in private homes would be to accommodate the citizens of the County. The average individual in a private home who would hire a domestic servant is not typically going to be a person who can simply add one more form to the computer program. Certainly the County can take into account the obvious differences between businesses accustomed to keeping employment records and to withholding taxes, versus homemakers who are not.

CONCLUSION

The judgment of the Alabama Supreme Court is correct in its result and should be affirmed with such modifications as this Court deems appropriate. An expeditious and definitive resolution of the equal protection issues concerning the validity of the Occupational Tax is of vital importance to the County. Therefore, regardless of this Court's disposition of the judgment of the Alabama Supreme Court, the Respondents respectfully request that this Court decide the federal equal protection question of which it has taken jurisdiction and render judgment upholding the constitutional validity of the Occupational Tax.

Respectfully submitted,

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